

While this discussion is mostly academic, my position on incorporation of the Bill of Rights has shifted. My best current read of the original public meaning of the 14th Amendment is that the Privileges or Immunities Clause was likely meant to incorporate the Bill of Rights. Current doctrine selectively incorporates through the Due Process Clause. This is an issue of lively ongoing debate among constitutional scholars and courts. The basis for incorporation has implications regarding how courts should interpret the Establishment Clause. That said, my goal in any case raising this question would be to follow the governing precedent of the United States Supreme Court. Under current doctrine, it is clear no state may establish their own religion.

It's also important to note that I made clear when a law student in 2005 that any state establishment of religion would be a very bad idea. What is constitutional and what is good public policy are two very different questions."